17-3093

IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

JOHN R. VAN ORDEN, et al.,
Plaintiffs-Appellants,

v.

MARK STRINGER, et al.,
Defendants-Appellees.

Appeal from the United States District Court
Eastern District of Missouri, The Honorable Audrey G. Fleissig

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BRIEF OF RESPONDENTS

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CASE SUMMARY AND STATEMENT ON ORAL ARGUMENT

Plaintiffs are a class of individuals adjudicated by a court to be dangerous sexually violent predators. A few members have since obtained conditional release, but the rest legally meet the criteria for continued commitment because they have never obtained a court order altering their status.

This case involves the improper attempt to bootstrap state statutory and procedural arguments into the doctrine of substantive due process. Plaintiffs assert that Defendants violated the Missouri statute that requires certain procedures for civil commitment. They assert that compliance with these procedures is constitutionally necessary. But instead of raising a state statutory or procedural due process claim, they have raised only a substantive due process claim.

Binding precedent prohibits Plaintiffs from suing under substantive due process when some other legal provision applies. Moreover, this Court's decision in *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017), is indistinguishable from this appeal and controls the result.

Because Plaintiffs' claim is not cognizable and is foreclosed by *Karsjens*, fifteen minutes for oral argument, not thirty, is sufficient.

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STATEMENT OF THE CASE

Plaintiffs are a class of persons who are or were civilly committed to the Sexual Offender Rehabilitation and Treatment Services (SORTS) facilities in Missouri. After the benefit of a full trial, each person was adjudicated to be a sexually violent predator: a person with a history of sexually violent offenses, who has a mental abnormality, and who is likely to commit more sexually violent offenses if not civilly committed. A few members have subsequently obtained conditional release. Plaintiffs assert that the Defendants—officials who run the commitment program—violated the state statute governing commitment of sexually violent predators and therefore violated substantive due process. They have waived all statutory and procedural due process claims.

I. The State passes a law that permits commitment of and provides treatment for dangerous sexually violent offenders who have mental abnormalities.

Following the Supreme Court's holding in *Kansas v. Hendricks*, 521 U.S. 346 (1997), that States may subject sex offenders to civil commitment if they are dangerous due to mental abnormality, Missouri

passed a statute that provides for civil commitment of persons who are adjudicated to be sexually violent predators. Mo. Rev. Stat. § 632.480, *et seq*. The Missouri Supreme Court upheld this statute against a constitutional challenge because it was similar to the statute *Hendricks* upheld. *Thomas v. State*, 74 S.W.3d 789, 790 (Mo. 2002); *In re Van Orden*, 271 S.W.3d 579, 586 (Mo. 2008) (reaffirming the constitutionality of the statute after amendments).

Aware of the need to balance the high risk some sex offenders pose to the community against legitimate liberty interests, the State civilly commits only a small fraction of sex offenders. Between 3 and 5 percent of sex offenders—those "at the highest risk to sexually reoffend"—are committed. 7 Tr. 182. Those individuals typically have exhibited a demonstrated pattern of horrific crimes and recidivism. For example, one person recently committed "sodomized his 10- or 11-year-old nephew" less than three months after release from prison and before he was committed. *Kirk v. State*, 520 S.W.3d 443, 449 (Mo. 2017). Another committed 55 sexual offenses or instances of sexual misconduct,

including rape and numerous threats to rape and murder others. *Nelson v. State*, 521 S.W.3d 229, 231 (Mo. 2017).

The statute provides substantial procedural protections. To commit an individual, a committee of five members representing a cross-section of the State must determine that the individual meets the definition of a sexually violent predator. Mo. Rev. Stat. § 632.483.5. The Attorney General then has a short time frame to file a petition in state court, "alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation." *Id.* § 632.486. The process ceases there unless the court then holds a hearing to determine whether probable cause exists to commit the individual. *Id.* § 632.489. The individual has robust procedural rights at that probable-cause hearing and is entitled to representation by counsel. *Id.* The government also cannot use the committee's determination as evidence. *Id.* If the court finds probable cause, the court has sixty days to conduct a full trial, during which the individual again has full trial rights, including the right to representation by counsel. *Id.* § 632.492. A person can be committed only upon clear and convincing evidence that he or

she satisfies the statutory criteria for commitment, and by a unanimous verdict. *Id.* § 632.495. Thus, no one is committed unless a unanimous jury (or the court in a bench trial) finds by clear and convincing evidence that the person "suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility," and that the person has previously been convicted of a sexually violent offense or previously committed as a criminal sexual psychopath under a prior version of Missouri law. Mo. Rev. Stat. § 632.480(5). Further, "any determination as to whether a person is a sexually violent predator may be appealed" to the state appellate courts. Mo. Rev. Stat. § 632.495.1.

During commitment, an individual is entitled to additional procedural protections. Each person is entitled to an annual examination of his mental condition. *Id.* § 632.498. A report of that assessment is forwarded to the court, which must conduct an annual review of the committed person's status. *Id.* Each individual also has the right to independently petition the court for release, and program officials must notify each person of that right annually. *Id.* When a

person petitions for release and makes a preliminary showing that he no longer meets the criteria for commitment, the court must hold a trial at which the State bears the burden of proving that commitment is still necessary. *Id.*

To avoid bogging down court administration with pointless trials, Missouri law includes a provision that allows courts to dismiss a petition without a hearing if it is "based upon frivolous grounds." *Id.* § 632.504. If the Department Director endorses the petition, the court deems the petition nonfrivolous. *Id.* § 632.501.

Persons who successfully petition for release can be released conditionally. The "primary purpose" of conditional release is "to provide outpatient treatment and monitoring to prevent the person's condition from deteriorating to the degree that the person would need to be returned to a secure facility." *Id.* § 632.505.1. The conditions include requiring that a released person "[o]bey all federal and state laws," register as a sex offender, or continue taking prescribed psychiatric medications. *Id.* § 632.505.3(3), (16), (20). The statute also provides that the court "may modify the conditions of release upon its own motion" or

upon a petition by the Department or by "the person on conditional release," *id.* § 632.505.6, and that the court should keep in place only those conditions of release that it "deems necessary to meet the person's need for treatment and supervision and to protect the safety of the public." *Id.* § 632.505.3.

II. The district court initially enters a judgment of liability against Defendants.

Plaintiffs filed their original complaint in 2009 and amended it five times. JA 123. They raised numerous constitutional challenges and asserted dozens of prayers for injunctive relief, including requesting that the district court "[d]ismantle and close down SORTS . . . and order the immediate discharge of all SORTS residents." JA 208–18.

The district court certified two classes under Federal Rule of Civil Procedure 23(b)(2): a "Treatment Class" defined as "residents of SORTS as a result of civil commitment" and a "Charging Class" defined as SORTS residents "who have been, or will be, billed or charged for care, treatment, room, or board by SORTS." Add. A. 2–3. The classes included about 225 people. Add. B. 2. The court bifurcated the trial into a liability stage and a remedies stage.

After discovery, Plaintiffs dropped some claims, including a claim under the Americans with Disabilities Act, leaving four claims remaining. Plaintiffs challenged the facial validity of the commitment procedures under substantive due process and also challenged the facial validity of the reimbursement provisions. Add. B. 2. Plaintiffs also raised two as-applied challenges under substantive due process: 1) that the medical treatment was inadequate because of staff and funding shortages, and 2) that the treatment program was a "sham" because Defendants purportedly assessed Plaintiffs using the wrong legal standard and because the program had not established the statutorily required release procedures and nobody had been fully reintegrated into the community. *Id.* at 3.

The district court rejected Plaintiffs' two facial challenges and the as-applied challenge to the adequacy of treatment. Add. A. 6. But, at least initially, the district court determined that the Missouri commitment statute was unconstitutional as applied under substantive due process because it found that the Defendants were not complying with the statute in three ways.

First, the Court determined that risk assessors sometimes applied an incorrect legal standard when evaluating Plaintiffs. Add. B. 3. Some assessors believed that an individual's mental abnormality had to change, but the correct standard holds that persons should not remain committed after their future dangerousness ceases, even if their mental abnormalities persist. Add. A. 23, 53.

Despite this determination, the district court recognized some of the challenges the program faces. It found that "SORTS has historically suffered from staffing and budget shortages." *Id.* at 19. And risk assessors were improperly applying the statute because difficulties with training assessors meant "they have misunderstood and been confused about how to apply the statutory criteria." *Id.* at 23.

The district court also determined that the program had substantially improved since obtaining a modest funding increase. Assessors were basing risk in part on how much progress individuals had made in the treatment programs, but, initially, "minor infractions could affect a resident's progression." *Id.* at 20. The district court found that SORTS "now focuses on treatment-related behaviors," not "minor

infractions," making the assessors' evaluations more accurate. *Id.* And changes to the program meant that "many aspects of SORTS treatment programs now conform to accepted standards" of other treatment programs. *Id.* at 19.

Second, the district court initially found that the program had not adequately implemented community reintegration, as required by state statute. *Id.* at 29. The time frame for treatment programs was long, and although several individuals have been fully released, others on conditional release still resided on the SORTS campus in a building called the "Annex." That building is "less restrictive" and affords residents the opportunity for "unescorted trips outside the facility," including to "work at jobs in the community, to go grocery shopping, or to simply walk around." *Id.* at 8, 29–30. But the Annex is not in the community; it is behind a fence on the SORTS campus. *Id.* at 29. The district court held that some of these conditionally released individuals should have been afforded "less restrictive" conditions. *Id.* at 31. But the district court acknowledged that the program had been unable to do so because the Governor had repeatedly rejected Defendants' budgetary

requests for funds to implement better community integration efforts each year since 2009 or 2010. *Id.* at 31–32.

Third, the district court determined that the Director had not endorsed any individual's petition for release. Add. A. 27. Individuals do not need an endorsement to petition for release; an endorsement merely informs the state court that the petition is nonfrivolous. Mo. Rev. Stat. §§ 632.501, 632.504. The district court also determined that the Director had implemented a three-step process—not required by statute—to obtain an endorsement. *Id.* at 28. But the district court also recognized that some circumstances outside Defendants' control impeded this process. One of the officials in charge of the process "was out of the office due to a family emergency," and others had not received training to keep that process flowing. *Id.*

III. Plaintiffs reject a settlement offer, this Court decides *Karsjens*, and the district court reverses its liability holding.

Because an appeal was pending in *Karsjens v. Piper*, 845 F.3d 394 (8th Cir.), *cert. denied*, 138 S. Ct. 106 (2017), when the district court issued its liability finding, the parties jointly moved to stay proceedings

and engage in mediation. Add. B. 5–6. Counsel for both parties reached a proposed settlement, but some class members objected. They noted "that they understood that the proposed settlement would eliminate the significant risk" that they would not prevail in the light of *Karsjens*. *Id.* But the objectors maintained opposition, so the district court rejected the proposed settlement. *Id.*

This Court then decided *Karsjens*, upholding the constitutionality of the Minnesota SVP Act, facially and as applied as a matter of substantive due process. Moreover, *Karsjens* involved a record substantially similar to the record here—if anything, the Minnesota program was much more restrictive the Missouri's program. *See Karsjens*, 845 F.3d at 402–03. For example, the district court in *Karsjens* held, among other things, that assessors improperly performed risk assessments, that individuals who did not meet the criteria for commitment nonetheless remained committed, that "discharge procedures are not working properly," and that persons were not being reintegrated into the community in less restrictive facilities. *Id.*

The *Karsjens* plaintiffs raised a substantive due process claim, but they did not contend that the program violated procedural due process or the Minnesota statute. This Court held that the plaintiffs could prove a substantive due process violation only if they could establish *both* that they were asserting a "fundamental right" subject to strict scrutiny *and* that the conduct shocked the conscience. *Id.* at 408. This Court noted that the Supreme Court has never declared that persons like plaintiffs "possess a fundamental liberty interest in freedom from physical restraint." *Id.* at 407. This Court also held that none of the district court's findings shocked the conscience because the conduct was not "egregious, malicious, or sadistic." *Id.* at 410–11.

The district court in this case then determined that *Karsjens* squarely foreclosed relief for Plaintiffs and reversed its prior determinations on liability. The district court was "reluctan[t]" to reconsider its liability determination "in light of the extensive proceedings to date," but it concluded "the Court cannot distinguish Defendants' conduct . . . from the conduct of the state defendants in

Karsjens." Add. B. 2, 12. The district court reversed its liability holding and dismissed all Plaintiffs' claims with prejudice. *Id.* at 13.

Plaintiffs then moved under Rule 59(e) to amend the judgment. Plaintiffs had pleaded a state-law substantive due process claim, which the district court's final judgment did not explicitly address. Plaintiffs asked the district court to amend the judgment to dismiss that claim without prejudice. Add. D. 1.

The district court rejected that motion, holding that dismissal with prejudice was warranted because Plaintiffs abandoned that claim. *Id.* Plaintiffs focused their briefing on the federal claims, not the state-law substantive due process claim, and had disregarded numerous opportunities over several years to prosecute that claim. *Id.* at 1–2.

SUMMARY OF ARGUMENT

Plaintiffs improperly attempt to use the vehicle of substantive due process to litigate procedural and statutory claims. They assert that Defendants violated state law by deviating from procedures required by statute, and they insist that those procedures are constitutionally required. But that constitutional argument is quintessentially procedural, not substantive. As the Supreme Court has held, arguments about "whether the constitutionally requisite procedures [were] provided" are procedural due process arguments. If Plaintiffs have a constitutional claim at all, it must fall under *procedural* due process, which they have not raised.

This distinction matters because settled law prohibits Plaintiffs from dressing up a procedural or statutory claim under the doctrine of substantive due process. Allowing otherwise would permit litigants to collapse all infractions into that doctrine, transforming federal courts into tribunals for every controversy. If Plaintiffs wanted to argue that Defendants deviated from constitutionally required statutory

procedures, they needed to raise a statutory claim or a procedural due process claim. They waived both.

Plaintiffs insist that their claim is substantive because they assert that none of them meets the criteria for commitment. But as the Supreme Court has said, this argument "puts the cart before the horse." Plaintiffs have been adjudicated by a court as sexually violent predators. Except for those few who have been conditionally released, they legally meet the criteria for commitment until a state court concludes otherwise. Even if they could prove that *some* of them no longer meet that criteria, they forfeited the right to assert individualized claims when they sought class certification under Federal Rule of Civil Procedure 23(b)(2). That rule allows a court to issue an injunction only if it can issue the same relief to every class member, and Plaintiffs made no attempt to prove that every class member no longer meets the criteria for commitment.

Plaintiffs' claim also fails because they could sue to obtain relief in state court. Settled law prohibits Plaintiffs from raising a procedural or substantive due process claim when state law provides an adequate

remedy. Allowing plaintiffs to sue here when they could raise a statutory claim in state court would violate settled principles of federalism.

Plaintiffs' claim is also foreclosed by this Court's holding in *Karsjens v. Piper*, 845 F.3d 394 (8th Cir.), *cert. denied*, 138 S. Ct. 106 (2017). There, this Court held that litigants challenging executive conduct under substantive due process must prove both that the liberty interest they assert is fundamental and that the conduct shocks the conscience. This Court held that the plaintiffs—sexually violent predators committed in Minnesota—met neither element.

The same is true here. Plaintiffs assert the same interest the *Karsjens* plaintiffs asserted, so they do not sue over a fundamental right. And every finding in this record is parallel to a finding in *Karsjens* that did not shock the conscience. The record here states that Defendants putatively deviated from the Missouri statute in three ways: applying the wrong legal standard when assessing Plaintiffs' treatment progress, failing to implement community reintegration, and

implementing procedures that made obtaining the Director's endorsement on a release petition more difficult.

But this Court in *Karsjens* held that the district court's findings did not shock the conscience even though the Minnesota defendants incorrectly performed risk assessments, the Minnesota plaintiffs were subject to "indefinite detention" because the "discharge procedures [we]re not working properly," and the director failed to affirmatively help individuals petition for release.

The district court determined that *Karsjens* entails that plaintiffs will rarely, if ever, be able to maintain a substantive due process claim in the context of commitment for sexually violent predators. This is correct. *Karsjens* strongly reaffirms the basic principle that a plaintiff who has access to statutory or procedural due process protections ordinarily cannot raise a claim under substantive due process.

Plaintiffs' argument that *Karsjens* was incorrectly decided fails. They insist that substantive due process applies if conduct shocks the conscience—even if, as here, no fundamental right is at issue. But

settled law establishes that substantive due process applies only when a fundamental right is at issue.

They also assert that *Karsjens* should have applied a deliberate-indifference standard because Defendants putatively had time to deliberate. But *Karsjens* held that the defendants' conduct did not shock the conscience under *either* the deliberate-indifference standard or the intent-to-harm standard. Also, Supreme Court precedent provides that the intent-to-harm standard can apply whenever the defendants "have obligations that tend to tug against each other." Here, Defendants have the difficult job of balancing the legitimate liberty interests of Plaintiffs with the community interest in safety from dangerous sexually violent predators. Applying the intent-to-harm standard is appropriate.

Even under the deliberate-indifference standard, Defendants would still prevail. This Court held in *Karsjens* that parallel conduct did not amount to deliberate indifference. And the district court here not only never made an express holding about deliberate indifference, but also stated that Defendants' putative deficiencies were due in large part to chronic underfunding by the legislature.

Plaintiffs also assert that the district court should have dismissed their state-law substantive due process claim without prejudice. But the district court acted well within its inherent powers and discretion under Rule 41(b) to dismiss Plaintiffs' claim because they repeatedly failed to prosecute that claim.

STANDARD OF REVIEW

"After a bench trial, this court reviews the district court's findings of fact for clear error, and its legal conclusions de novo." *Lisdahl v. Mayo Found.*, 633 F.3d 712, 717 (8th Cir. 2011). A district court's order denying a motion to alter or amend is reviewed for abuse of discretion. *Sipp v. Astrue*, 641 F.3d 975, 980–81 (8th Cir. 2011).

ARGUMENT

Plaintiffs' substantive due process claim fails for two reasons. Their claim is not cognizable under the doctrine of substantive due process. And even if it were, *Karsjens* squarely forecloses their claim. The district court also properly denied their request to dismiss their state substantive due process claim without prejudice because Plaintiffs failed to prosecute that claim.

I. Plaintiffs have not raised a cognizable claim under the doctrine of substantive due process.

Plaintiffs have not raised a cognizable claim. They purport to raise a substantive due process claim, but they argue only that Defendants violated a state statute. They cannot bootstrap that claim into the doctrine of substantive due process. They also cannot simply assume, as

they do, that each class member is entitled to release. And even if they had a cognizable claim, they could not raise it because they have an adequate state-court remedy.

A. Plaintiffs cannot bootstrap a procedural due process or statutory argument into the doctrine of substantive due process.

Although Plaintiffs assert that they raise a substantive due process claim, the only conduct they challenge is purported infractions of statutory procedures. As they admit, their claim depends on establishing that Defendants "have ignored the requirements of the Missouri statute." Pl. Br. i. They stress that "[t]his case focuses on . . . the very statutory mechanisms designed to make Missouri's SVP Act constitutional." Pl. Br. 36. Specifically, the record identifies that Defendants purportedly failed to follow statutory procedures in three ways: 1) applying an incorrect legal standard when assessing class members' dangerous proclivities, 2) failing to implement the statutory release procedures by not securing less restrictive facilities for conditionally released persons, and 3) failing to perform the petition procedures "in the manner required by the SVP Act" by creating a

process that made it difficult to obtain the Director's endorsement on a release petition. Add. A. 53–55; Pl. Br. 37–38.

Plaintiffs assert that these purported statutory infractions violate the Constitution because, according to them, availability of these procedures was a "key reason the Supreme Court upheld the facial validity of the SVP Act in *Kansas v. Hendricks*." Pl. Br. 36. But instead of raising a statutory or procedural due process claim, Plaintiffs assert that these purported infractions violate *substantive* due process. That claim fails for many reasons.

For one thing, Plaintiffs have not proven that these provisions are constitutionally necessary. In *Karsjens*, this Court upheld the Minnesota statute as facially valid even though that statute includes no procedure for assessing committed individuals, *Karsjens v. Piper*, 845 F.3d 394 (8th Cir.), *cert. denied*, 138 S. Ct. 106 (2017). The Defendants' purported failure here to comply with assessment procedures cannot be unconstitutional because *Karsjens* held that those procedures are not required at all. Also, the Director's purported failure to endorse release petitions cannot be unconstitutional because individuals can

independently petition for release without the Director's endorsement. True, the state court can dismiss frivolous petitions without a hearing if the Director has not endorsed them, but Plaintiffs fail to cite any authority to suggest that a procedure for judicial pre-screening of frivolous petitions is unconstitutional. *Cf.* 28 U.S.C. § 1915(e)(B)(i) (permitting federal courts to dismiss certain frivolous petitions before service). And the provision creating frivolity review is reasonably related to the State's interest in efficient judicial administration. Without that provision, the court would be required to hold a hearing on every petition, no matter how frivolous. Mo. Rev. Stat. § 632.498.

Moreover, even if all these statutory procedures were constitutionally required, Plaintiffs cannot shoehorn a procedural or statutory argument into the doctrine of substantive due process. Plaintiffs' argument conflates the clear distinction the Supreme Court has drawn between procedural and substantive due process.

Procedural due process concerns the *procedures* a government must provide to protect a liberty interest. "[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—

cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (citation omitted). Arguments about "whether the constitutionally requisite procedures [were] provided" are procedural due process arguments. *Swarthout v. Cooke*, 562 U.S. 216, 221 (2011).

Substantive due process, in contrast, prohibits a State from infringing "certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). In other words, the "Due Process Clause requires compliance with fair *procedures* when the government deprives an individual of certain liberty or property interests," but substantive due process protects "certain fundamental rights, no matter what process is provided." *Kerry v. Din*, 135 S. Ct. 2128, 2142 (2015) (Breyer, Ginsburg, Sotomayor, Kagan, JJ., dissenting) (internal quotation marks and citations omitted).

Plaintiffs' claim does not fit within substantive due process. Plaintiffs do not contend that the State cannot commit them "*at all*, no

matter what process is provided." *Flores*, 507 U.S. at 302. They do not contend that the *substantive* criteria for commitment—such as mental abnormality and future dangerousness, *see* Mo. Rev. Stat. § 632.480(5)—violate the Constitution. Indeed, Plaintiffs admit that Defendants act constitutionally when they comply with the SVP statute. Pl. Br. 36. They instead contend that Defendants deviated from the statutory procedures. That argument is quintessentially procedural, not substantive, because it concerns only "whether the constitutionally requisite procedures [were] provided." *Swarthout*, 562 U.S. at 221. Plaintiffs thus have not raised a colorable substantive due process claim, and they waived the opportunity to raise a procedural due process claim or a statutory claim.

Plaintiffs also cannot raise a substantive due process claim indirectly by asserting that a procedural or statutory infraction violates substantive due process. Settled law prohibits bootstrapping these kinds of arguments into the doctrine of substantive due process.

1. As stated above, Defendants' purported deviation from statutory procedures does not violate procedural due process because

those procedures are not constitutionally required. But even if they were required, Plaintiffs could not raise a substantive due process claim by asserting a procedural violation of statutory procedures. Whenever a plaintiff can litigate a claim under a specific legal provision, the plaintiff may not rely on "the more generalized notion of 'substantive due process.'" *E.g.*, *Graham v. Connor*, 490 U.S. 386, 395 (1989) (applying the Fourth Amendment instead of substantive due process). Allowing Plaintiffs to layer substantive due process protections on top of other legal protections would impermissibly render the Constitution a "font of tort law to be superimposed." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998) (citation omitted).

Under these principles, for example, substantive due process does not recognize a "claim of 'actual innocence'" in criminal law because the Constitution protects individuals from wrongful conviction through *procedural* due process. *Herrera v. Collins*, 506 U.S. 390, 404 (1993) ("[A] claim of 'actual innocence' is not itself a constitutional claim."). Even if an inmate's "conviction is factually incorrect," that inmate is guilty "in the eyes of the law" as soon as he is convicted by

constitutionally adequate procedures. *Id.* at 399; *id.* at 416 ("[T]he trial is the paramount event for determining the guilt or innocence of the defendant.").

Similarly, substantive due process does not encompass a defendant's failure to comply with state-law procedures. In *Parratt v. Taylor*, a plaintiff asserted that prison officials violated the Constitution when they lost his property. *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). The Supreme Court acknowledged that the inmate was deprived of his property, but it rejected his constitutional argument because "the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." *Id.* at 534.

Under these precedents, Plaintiffs cannot litigate a procedural argument under the doctrine of substantive due process. Plaintiffs argue that their purported liberty "deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure," so their claim is not cognizable under substantive due process. *Id.* at 534. And like the inmate in *Herrera*, Plaintiffs'

protections are procedural, not substantive. The Constitution requires only that a commitment "takes place pursuant to proper procedures and evidentiary standards." *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997). Each class member has been adjudicated by a court to be a sexually violent predator. If Plaintiffs wish to contest their commitment status, they must follow the procedures provided by the state statute or raise a *procedural* due process claim asserting that the procedures afforded are inadequate.

2. Similarly, Plaintiffs cannot raise a substantive due process claim by asserting a statutory violation. They contend otherwise by asserting that "state-created liberty interests are entitled to protection under the Fourteenth Amendment's Due Process Clause." Pl. Br. 47 (quoting *Morgan v. Rabun*, 128 F.3d 694, 697 (8th Cir. 1997)). But "the concepts of liberty and property interests are, as we have noted, useful *solely* in the context of procedural due process." *Meis v. Gunter*, 906 F.2d 364, 369 (8th Cir. 1990) (emphasis added). Otherwise, "the violation of every such statute would be a violation of the Due Process Clause of the Fourteenth Amendment. This is emphatically not the

law." *Id.*; *accord Williams v. Nix*, 1 F.3d 712 (8th Cir. 1993) ("[T]he mere violation of a state law or rule does not constitute a federal due process violation."); *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) ("A state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law.").

The notion that state law could *create* a new substantive due process right contradicts the well-established understanding that substantive due process protects only those rights that are "deeply rooted in this Nation's history." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation omitted). Thus, an action's "illegality under the state statute can neither add to nor subtract from its constitutional validity" under substantive due process. *Snowden v. Hughes*, 321 U.S. 1, 11 (1944). State statutes may provide powerful evidence as to whether a particular right is, in fact, deeply rooted in the Nation's history and tradition, but they do not create new substantive due process rights out of whole cloth.

The import of all these cases is clear. Plaintiffs focus their argument on the assertion that Defendants did not comply with the procedures required by statute. That argument is procedural, not substantive, because Plaintiffs argue about "whether the constitutionally requisite procedures [were] provided." *Swarthout v. Cooke*, 562 U.S. 216, 221 (2011). Plaintiffs also cannot expand the doctrine of substantive due process by asserting that purported procedural due process or statutory infractions violate substantive due process.

B. Plaintiffs cannot convert this case into one about substantive due process by asserting that the class members do not meet the criteria for commitment.

Recognizing that the Supreme Court has held that substantive due process does not apply to commitment of sexually violent predators, *Hendricks*, 521 U.S. at 357, Plaintiffs insist that they are asserting a substantive due process claim on the ground that none of them is a sexually violent predator. They cite case law for the proposition that a person is entitled to be free from commitment after if they no longer meet the criteria for commitment. Pl. Br. 44. (citing *O'Connor v.*

Donaldson, 422 U.S. 563, 574–75 (1975)). And they assert that this case is entirely about "confinement *after* the individual is no longer 'likely' to re-commit." Pl. Br. 41. This argument fails for three reasons.

First, like the inmate in *Herrera*, Plaintiffs "put[] the cart before the horse." *Herrera*, 506 U.S. at 408. Plaintiffs assume that they no longer meet the criteria for commitment. But even if they were factually correct, they are legally sexually violent predators (except for those on conditional release) because a court has adjudicated them to be persons meeting the criteria for commitment, and no state court has adjudicated them to no longer satisfy the substantive criteria for commitment. *See id.* at 399 (holding that an inmate convicted with the benefit of procedural protections is guilty "in the eyes of the law" even if "factually" innocent). This case is therefore unlike *Foucha*, where the State did not dispute that the committed person no longer met the criteria for which he was committed. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Every Plaintiff who believes he no longer satisfies the criteria for commitment may pursue that claim using the constitutionally adequate review procedures in state court that the statute provides.

Because the Plaintiffs are legally sexually violent predators (except for those who have been conditionally released), the issue is not whether the State can commit a person who does not meet the criteria for commitment. The issue instead is whether Defendants are depriving Plaintiffs of procedures to contest their status as sexually violent predators. Plaintiffs have not raised and cannot raise that claim.

This Court went even farther than this conclusion in *Karsjens*. The district court there actually found that class members no longer met the criteria for commitment: "individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk." *Karsjens*, 845 F.3d at 402. But this Court rejected the plaintiffs' contention that this finding amounted to a substantive due process violation. *Id.* at 410. Those plaintiffs were protected by procedural due process.

To be sure, a small handful of individuals no longer meet the criteria for confinement and have therefore been conditionally released. Consistent with the conditions that state courts imposed, they resided in the "Annex" under partial supervision. Imposing conditions on sex

offenders, such as limits on where they can live, work, and travel, is constitutional. *E.g.*, *Smith v. Doe*, 538 U.S. 84 (2003) (upholding sex offender registry requirements). To the extent some Plaintiffs think their conditions are excessive, they can petition a court to modify the conditions. Mo. Rev. Stat. § 632.505.6. Their relief is procedural, not substantive.

Second, Plaintiffs' contention that some class members "no longer meet the criteria for confinement," Pl. Br. 41, is not cognizable under the rule through which Plaintiffs certified this class action. This class includes every person who resides at SORTS as a result of commitment as a sexually violent predator. Add. A. 1–2. Plaintiffs asked the district court to certify the class under Federal Rule of Civil Procedure 23(b)(2). Add. B. 2. But certification under that rule permits relief "only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart v. Dukes*, 564 U.S. 338, 360 (2011). A court can enter an injunction "only as to all of the class members or as to none of them." *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (quoting *Dukes*, 564 U.S. at 360). "A Rule 23(b)(2) action cannot resolve

individualized issues of fact, nor provide different types of relief required to redress individual injuries." *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.*, 209 F.R.D. 323, 342 (S.D.N.Y. 2002).

Plaintiffs focus their attention on a few elderly or infirm class members whom Plaintiffs assert no longer meet the criteria for commitment. Pl. Br. 17. But even if Plaintiffs could prove their contention for those class members, the record lacks anything to suggest that *none* of the class members meet the criteria for commitment. No court could enjoin Defendants to release these individuals because a court may issue only a "single injunction" that gives relief to every class member. When Plaintiffs brought this class action under Rule 23(b)(2), they gained the convenience of litigating classwide claims for all members, but abandoned the opportunity to pursue individualized relief.

C. Plaintiffs' claim also fails because they had an adequate opportunity to obtain relief under state law.

Plaintiffs have not raised a procedural due process claim. But if this Court chooses to disregard Plaintiffs' waiver and construe their argument as a procedural due process argument—or even if this Court

believes Plaintiffs raised a colorable substantive due process argument—binding precedent prohibits Plaintiffs from pursuing their claim.

Plaintiffs cannot bring a procedural due process claim in this Court because they could have raised a statutory claim in state court. "[A] procedural due process claim lacks merit where there exists an adequate state court remedy." *Zakrzewski v. Fox*, 87 F.3d 1011, 1014 (8th Cir. 1996). Raising a statutory claim in state court would have been adequate because, as Plaintiffs admit, their claim "focuses" on Defendants' purported statutory infraction. Pl. Br. 36. Plaintiffs do not contend that the state courts themselves are inadequate, and this Court must presume those courts would "afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987).

For the same reason, Plaintiffs cannot maintain a claim even if this Court determines that the claim fits within the doctrine of substantive due process. The rule that a plaintiff cannot pursue a constitutional claim where they have an adequate state-court remedy

applies to both "substantive and procedural due process claims." *Ali v. Ramsdell*, 423 F.3d 810, 814 (8th Cir. 2005). As the Supreme Court explained, "where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for [federal] intervention," regardless of whether the plaintiff "attach[es] a substantive rather than procedural label." *Albright v. Oliver*, 510 U.S. 266, 285 (1994) (Kennedy, O'Connor, JJ., concurring) (citing *Parratt*, 451 U.S. at 536); *see also McCullah v. Gadert*, 344 F.3d 655, 658 (7th Cir. 2003) (adopting this concurrence as the controlling opinion because of *Marks v. United States*, 430 U.S. 188 (1977)).

Allowing Plaintiffs to assert a claim here when they have an adequate remedy in state court would also raise "strong federalism and judicial restraint concerns." *See Brittain v. Hansen*, 451 F.3d 982, 995 (9th Cir. 2006). "If any deprivation of [statutory] rights, no matter how slight, can give rise to a substantive due process claim, litigants will not only be able to use substantive due process as a 'font of tort law,' but also as a tool to transform federal courts into [state] courts." *Id.*

(citation omitted). Courts must always be mindful of the need to preserve comity between state and federal courts. *E.g.*, *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 431 (2010). Creating an additional layer of substantive due process rights—or even construing Plaintiffs' claim as a procedural due process claim—would impede comity between federal and state courts by allowing Plaintiffs to "transform federal courts into [state] courts." *Hansen*, 451 F.3d at 995.

II. *Karsjens* forecloses Plaintiffs' claim.

Not only have Plaintiffs failed to raise a colorable substantive due process claim, but even if they had, their claim would fail in the light of this Court's recent decision in *Karsjens*. That decision considered findings by the Minnesota district court that are indistinguishable from the record here, yet *Karsjens* held that none of those findings supported a substantive due process claim.

Even if this Court were free to reconsider *Karsjens*, which it is not absent en banc review, this Court should reach the same result *Karsjens* reached. Contrary to Plaintiffs' assertions, *Karsjens* applied the correct legal standard. And Plaintiffs' claim would still fail even under the legal standard they propose.

A. *Karsjens* is indistinguishable from this case and controls the result.

Under *Karsjens*, a substantive due process claim fails unless the record "demonstrate[s] *both* that the state defendants' conduct was conscience-shocking, *and* that the state defendants violated one or more fundamental rights" subject to strict scrutiny. *Karsjens*, 845 F.3d at 408 (quoting *Moran v. Clarke*, 296 F.3d 638, 651 (8th Cir. 2002) (en banc) (Bye, J., concurring and writing for a majority on this issue) (brackets omitted)). Nothing in the record demonstrates either of these two elements.

i. Nothing in the record shocks the conscience.

Conduct shocks the conscience only if it is "egregious, malicious, or sadistic." *Id.* at 408, 410-11. A state official's act meets this standard if it is "so severe[,] so disproportionate to the need presented, and so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id.* at 408 (ellipses omitted). Plaintiffs cannot meet this demanding standard because every putative deficiency in Defendants' conduct in this record closely

parallels conduct that this Court held in *Karsjens* did not shock the conscience.

For example, the first putative deficiency that the district court initially found is that Defendants incorrectly conducted risk assessments: "annual reviewers have not been applying the correct legal standard when evaluating whether a resident meets the criteria for conditional release." Add. A. 53. But the district court in *Karsjens* made similar findings. It held that the Minnesota SVP program was facially unconstitutional because it did not "require periodic risk assessments" at all and that it was unconstitutional as applied because "those risk assessments that have been performed have not all been performed in a constitutional manner." *Karsjens*, 845 F.3d at 402. On appeal, this Court held that these findings did not shock the conscience. *Id.* at 402, 410.

Plaintiffs try to distinguish *Karsjens* on this point by pointing out that the Minnesota statute did not *require* periodic risk assessment—even though the defendants there were conducting risk assessments anyway. Pl. Br. 53. But that distinction only undermines Plaintiffs'

argument. *Karsjens* held that those assessments are not constitutionally required because committed individuals can independently petition for release. *Karsjens*, 845 F.3d at 409–10. Plaintiffs thus cannot complain about purported deficiencies in the risk assessments here. Defendants had no constitutional obligation to perform those assessments at all because the Missouri SVP Act gives committed individuals the independent right to petition for release, regardless of the risk assessments. *Id.*; Mo. Rev. Stat. § 632.498.2.

Second, another putative deficiency initially found by the district court was that "Defendants are not properly implementing the last phase of the SORTS treatment programs, community reintegration," because "progress through the various treatment phases at SORTS is torturously slow," and Defendants have been unable to obtain housing less restrictive than the Annex for persons who have been conditionally released. Add. A. 54. But again, the *Karsjens* district court made strikingly similar findings. It determined that "individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk," "discharge procedures are

not working properly at the MSOP," and "there is no meaningful relationship between the treatment program and the end to indefinite detention." *Karsjens*, 845 F.3d at 402–03. On appeal, this Court held that those findings did not shock the conscience. *Id.* at 410. If the failure to reintegrate individuals who "completed treatment or sufficiently reduced their risk" in Minnesota did not shock the conscience, then the Missouri program's purported failure to implement reintegration also does not shock the conscience.

In tacit recognition that the findings by the district court in *Karsjens* cannot be distinguished, Plaintiffs attempt to re-litigate those findings. They contend that this Court should disregard the district court's conclusion in *Karsjens* that "individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk," Pl. Br. 55, because Plaintiffs believe that finding was clearly erroneous. *Id.* Plaintiffs provide no authority for the proposition that they can re-litigate a separate case. In any event, this Court assumed that finding was true when it held that the finding did not shock the conscience.

Plaintiffs also assert that Minnesota made more progress in community reintegration because Minnesota "entered into fifteen contracts for housing and treatment services outside of its facilities, and it made reintegration services available." Pl. Br. 54. But Minnesota's contracting activities are irrelevant. Minnesota committed more than three times as many people as Missouri—despite being a smaller State—but Minnesota has never discharged anybody. *Karsjens*, 845 F.3d at 401.

Third, the district court stated that Defendants' putative failure to properly implement community reintegration had "turn[ed] civil confinement into punitive, lifetime detention of SORTS residents." Add. A. 55. But again, the *Karsjens* district court also had found the same in Minnesota: "Minnesota's civil commitment scheme for sex offenders is a punitive system without the safeguards found in the criminal justice system." *Karsjens*, 845 F.3d at 402. And again, on appeal, this Court held that this finding by the Minnesota district court did not shock the conscience. *Id.* at 410.

Fourth, the district court stated that "the release procedures at SORTS are not being performed in the manner required by the SVP Act or the Due Process Clause," because "the director at DMH has effectively abdicated his duty to authorize petitions for conditional release for persons found not likely to reoffend." Add. A. 55. But again, the *Karsjens* district court made substantially similar findings. It held that Minnesota's statute was unconstitutional because it did not require any state mechanism to authorize early release at all: "[S]ection 253D does not require the state to take an affirmative action, such as petition for a reduction in custody, on behalf of individuals who no longer satisfy the criteria for continued commitment." *Karsjens*, 845 F.3d at 402. That absence meant that "individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk." *Id.* And again, on appeal, this Court held that this finding did not shock the conscience. *Id.*

Plaintiffs nonetheless insist that the purported failure of the Director to authorize petitions is unconstitutional because, absent that authorization, the statute "imposes heightened requirements on the

petitioner." Pl. Br. 53. But the only difference between a petition endorsed by the Director and one not endorsed is that a court can reject an unendorsed petition if it is frivolous. Mo. Rev. Stat. § 632.504. The statute reflects the commonsense understanding that the Director will not endorse frivolous petitions. And Plaintiffs have failed to cite any authority to suggest that dismissing frivolous petitions without a hearing is unconstitutional. *Cf.* 28 U.S.C. § 1915(e)(B)(i) (enabling courts to dismiss *in forma pauperis* complaints "if the court determines that the action or appeal is frivolous").

As the district court recognized in its order reversing its initial liability determination, *Karsjens* establishes that executive conduct can rarely, if ever, violate *substantive* due process in the context of civil commitment of sexually violent predators. Add. B. 12. But that is because *Karsjens* confirms that the protections afforded in this context are *procedural*: the Constitution requires only that a commitment "takes place pursuant to proper procedures and evidentiary standards." *Hendricks*, 521 U.S. at 357. Plaintiffs in the civil commitment context cannot layer on top of their procedural protections additional, vaguely

defined substantive protections. Permitting plaintiffs to do so would convert every procedural due process or statutory argument into a substantive due process claim, contrary to the Supreme Court's holding that courts must not resort to substantive due process when a claim can be litigated under specific legal provisions. *E.g.*, *Graham*, 490 U.S. at 395.

ii. Plaintiffs have not asserted a fundamental liberty interest.

The liberty interest Plaintiffs assert is not a fundamental liberty interest subject to strict scrutiny. Plaintiffs do not dispute that the Supreme Court (and this Court) have expressly held that sexually violent predators do not have a fundamental liberty interest in freedom from restraint and that their constitutional interest is procedural only. *Hendricks*, 521 U.S. at 357; *Karsjens*, 845 F.3d at 407. Plaintiffs instead assert that they have a fundamental liberty interest in freedom from restraint because they assume each of them no longer meets the criteria for commitment. Pl. Br. 41.

Again, this argument "puts the cart before the horse." *Herrera*, 506 U.S. at 408 n.6. Each class member has been adjudicated a sexually

violent predator. Except for those who have been conditionally released, the class members legally meet the criteria for commitment even if the basis for commitment were "factually incorrect." *Id.* at 416.

Even if some class members who have not been conditionally or fully released no longer meet the criteria for commitment, those class members cannot obtain relief in this proceeding. Rather, they must file individual petitions in state court under the constitutionally adequate procedures provided by the statute. When Plaintiffs chose to bring a class action under Rule 23(b)(2), they limited the scope of relief a court could afford. No court can grant relief unless it can do so in a "single injunction" that grants the same relief for every class member. *Dukes*, 564 U.S. at 360. Individualized determinations as to whether Plaintiffs continue to satisfy the criteria for commitment cannot be adjudicated under Rule 23(b)(2).

Plaintiffs appear to contend that their liberty interest in freedom from restraint is fundamental as a general matter, but this argument contradicts the Supreme Court's holding that governments can civilly commit individuals without satisfying strict scrutiny. *Hendricks*, 521

U.S. at 357. Plaintiffs argue otherwise by citing an earlier decision, *Foucha v. Louisiana*, for the proposition that "[f]reedom from physical restraint [is] a fundamental right." Pl. Br. 42 (citing 504 U.S. at 86). But they overlook that this statement carried only four votes because the fifth justice who joined most of the opinion expressly refused to join this statement. *Foucha*, 504 U.S. at 72.

Plaintiffs also overlook that the Supreme Court has consistently treated the liberty interest in freedom from physical restraint as a matter protected by procedure, not substance. Although the Constitution includes substantive protection against arbitrary infringements such as "incarcerat[ing] all who are physically unattractive or socially eccentric," *Donaldson*, 422 U.S. at 575, the statute's *substantive* criteria for commitment, such as mental abnormality and dangerousness, are not arbitrary. *See* Mo. Rev. Stat. § 632.480(5). Thus, the liberty interest in freedom from restraint is protected procedurally, not substantively.

A right is protected by procedural, not substantive, due process when it is "no more than an aspect of the 'liberty' protected by the [text

of] the Due Process Clause." *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978) (citation omitted). Thus, the Supreme Court held that the right to international travel was subject only to procedural limits because that right concerned physical freedom, not "fundamental liberty." *Id.*

Freedom from restraint is likewise protected procedurally, not substantively, except in limited circumstances of wholly arbitrary deprivation. Freedom from restraint is not only an "aspect" of the "liberty" mentioned in the Due Process Clause. *Id.* It is in fact the original meaning of "liberty" in that Clause. At common law, "the right of personal liberty" meant the "power of loco-motion . . . without imprisonment or restraint." 1 W. Blackstone, *Commentaries on the Laws of England* 130 (1769). Because freedom from restraint *is* the "liberty" contemplated by the Due Process Clause, it is almost always protected procedurally, not substantively. *Califano*, 439 U.S. at 176.

If freedom from physical restraint were to fall within the doctrine of substantive due process, legitimate government activity would scrape to a standstill. The government would not be able to limit the freedom of mobility "*at all*, no matter what process is provided," without using

the least restrictive means to further a compelling interest. *Flores*, 507 U.S. at 302. But every conviction, criminal sentence, routine traffic stop, security checkpoint, and traffic lane closure implicates the freedom from restraint. *See Commentaries*, *supra*, at 130 (defining this freedom to include "loco-motion" and "removing one's person to whatsoever place one's own inclination may direct"). Applying strict scrutiny to these interferences would disable legitimate government activity. "There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." *Hendricks*, 521 U.S. at 357.

Plaintiffs have not asserted a fundamental right. The liberty interest over which they sue is protected by procedural, not substantive, due process.

B. *Karsjens* applied the correct legal standard.

Plaintiffs attempt to distinguish *Karsjens* by arguing that it deviated both from previous decisions by this Court and from Supreme Court precedent.

They assert that *Karsjens* incorrectly applied the legal test in the conjunctive instead of disjunctive—that is, they contend that they need

to establish only that the conduct shocked the conscience *or* that the liberty interest at issue is fundamental. Pl. Br. 49. They acknowledge that this Court is bound by precedent but contend that this Court should rehear this issue en banc.

Plaintiffs also assert that the shocks-the-conscience standard should require only proving deliberate indifference, not proving that the conduct is "egregious, malicious, or sadistic." Pl. Br. 34. But that contention fails, and the record would not justify a finding of deliberate indifference even if that standard applied.

i. *Karsjens* correctly applied the legal standard conjunctively, and this Court must do the same.

Karsjens held that a plaintiff cannot establish a substantive due process claim without proving "*both* that the state defendants' conduct was conscience-shocking, *and* that the state defendants violated one or more fundamental rights" subject to strict scrutiny. *Karsjens*, 845 F.3d at 408 (citation and brackets omitted).

Plaintiffs assert that they can prove a substantive due process by showing one of these two elements. Pl. Br. 49–52. But *Karsjens* and the en banc holding it quotes are the authoritative interpretation of

Supreme Court precedent, so this Court must apply the standard in *Karsjens* conjunctively and cannot consider Plaintiffs' argument unless and until Plaintiffs move for en banc reconsideration. *Barber v. Johnson*, 145 F.3d 234, 237 (5th Cir. 1998). Plaintiffs acknowledge that their argument is barred when they ask this Court to "recommend this issue for en banc consideration." Pl. Br. 52.

Their argument is also meritless. They rely on *United States v. Salerno*, which imprecisely stated the test disjunctively. *United States v. Salerno*, 481 U.S. 739, 746 (1987). But *Lewis* clarified that the correct test is conjunctive. *Lewis* cited *Salerno* and quoted its disjunctive test. *Lewis*, 523 U.S. at 847. But in a footnote to the same paragraph, *Lewis* explained that the shocks-the-conscience inquiry is a "threshold question" that a court must answer before considering the "possibility of recognizing a substantive due process right." *Id.* at 847 n.8 (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)). *Lewis* thus made clear that a plaintiff cannot prevail without establishing *both* the "threshold" element that conduct shocks the conscience *and* the additional element that the right at issue is fundamental and subject to strict scrutiny.

Like this Court did in *Karsjens*, other circuits have affirmed what *Lewis* made clear: the standard is conjunctive. *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139–40 (3d Cir. 2000) (holding that substantive due process is violated only if conduct "shocks the conscience" and the "interest is 'fundamental' under the United States Constitution"); *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999); *Christensen v. Cty. of Boone*, 483 F.3d 454, 462 (7th Cir. 2007) (holding that substantive due process applies only if the conduct is "conscience shocking" and "a fundamental right has been impaired"); *Flowers v. City of Minneapolis*, 478 F.3d 869, 873 (8th Cir. 2007) (reaffirming that the legal standard is conjunctive).

Disregarding this precedent, Plaintiffs assert that the liberty interest need not be fundamental as long as the conduct shocks the conscience. Pl. Br. 49. But the Supreme Court has held that substantive due process applies only if fundamental rights subject to strict scrutiny are at issue. *E.g.*, *Glucksberg*, 521 U.S. at 721; *Flores*, 507 U.S. at 302. Plaintiffs contend that the Supreme Court decision in *Rochin v. California*, 342 U.S. 165 (1952), held that conduct that shocked the

conscience "alone was sufficient for a violation of substantive due process—without any need to establish a fundamental liberty interest." Pl. Br. 51. Plaintiffs provide no citation for that assertion, and they mischaracterize *Rochin*. That decision expressly held that the right at issue was "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Rochin*, 342 U.S. at 169 (citation omitted).

Plaintiffs' argument also conflicts with other circuits that hold that substantive due process cannot apply unless the right at issue is a fundamental right subject to strict scrutiny. *Newman v. Burgin*, 930 F.2d 955, 961–62 (1st Cir. 1991) ("[U]nless a fundamental liberty protected elsewhere in the Constitution . . . is at stake, the primary concern of the due process clause is procedure, not the substantive merits of a decision."); *Hill v. Borough of Kutztown*, 455 F.3d 225, 235 (3d Cir. 2006) (For an "interest to be protected for purposes of substantive due process, it must be 'fundamental' under the United States Constitution."); *LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1111 (6th Cir. 1995) ("Substantive due process affords only those protections so rooted in the traditions and conscience of our people

as to be ranked as fundamental." (citation and internal quotation marks omitted)); *Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001) ("[S]ubstantive due process . . . applies only to decisions affecting fundamental civil rights.") (Easterbrook, J.); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) ("Rights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution."); *C.B. By & Through Breeding v. Driscoll*, 82 F.3d 383, 387 (11th Cir. 1996) ("As an executive act, the [school] suspension contravenes substantive due process rights only if, in the Supreme Court's words, the right affected is 'implicit in the concept of ordered liberty.'" (citation omitted)).

To be sure, Plaintiffs correctly point out that decisions from this Court have cited the imprecise test expressed in *Salerno*. Pl. Br. 52. But in each of those decisions, the Court rejected a substantive due process challenge, so it is immaterial that those decisions imprecisely invoked the legal standard; the result would have been the same under either standard. Those imprecise statements were dicta.

ii. The shocks-the-conscience standard *Karsjens* articulated is correct.

Lewis identifies two different standards for conscience-shocking behavior that courts can apply. One standard requires that the defendant act "maliciously and sadistically for the very purpose of causing harm"; a second standard, deliberate indifference, requires "patently egregious" conduct, which courts may apply "only when actual deliberation is practical." *Lewis*, 523 U.S. at 850–51, 853.

Plaintiffs contend that *Karsjens* improperly applied the intent-to-harm standard and should instead have applied the deliberate indifference standard because, according to Plaintiffs, Defendants had time to deliberate. Plaintiffs also contend that *Karsjens* conflicts with prior panel decisions that applied the deliberate indifference standard. Pl. Br. 30–33. Both arguments fail.

First, Plaintiffs incorrectly contend that *Karsjens* applied the intent-to-harm standard. *Karsjens* in fact applied *both* standards and held that the complained-of conduct met neither. *Karsjens* held that none of the complained-of conduct was "egregious, malicious, or sadistic." *Karsjens*, 845 F.3d at 411. It thus combined the deliberate

indifference standard ("patently egregious") with the intent-to-harm standard (acting "maliciously and sadistically"). *Lewis*, 523 U.S. at 850–51, 853. True, *Karsjens* cited another case for the proposition that a litigant ordinarily must establish that the conduct was "inspired by malice or sadism." *Karsjens*, 845 F.3d at 408 (citation omitted). But this Court has done the same in other cases where it expressly considered whether deliberate indifference or intent to harm should apply. *Truong v. Hassan*, 829 F.3d 627, 631 (8th Cir. 2016).

Second, Plaintiffs misconstrue *Lewis* when they assert that *Lewis* creates a "bright line distinction" that requires applying the deliberate indifference standard whenever a defendant has time to deliberate. Pl. Br. 36. *Lewis* instead holds that deliberate indifference *sometimes* is appropriate when a defendant had time to deliberate but that courts must consider the unique context of each case.

Determining which *mens rea* standard to apply "demands an exact analysis of circumstances." *Lewis*, 523 U.S. at 850. Deliberate indifference *may* apply "when actual deliberation is practical." *Id.* at 851. But courts must also consider whether the defendants in a given

circumstance "have obligations that tend to tug against each other." *Id.* at 850, 853. Far from establishing a bright-line standard, *Lewis* cautions courts to carefully look at all relevant circumstances.

Numerous circuits have held that courts should not automatically apply the deliberate-indifference standard whenever a defendant had an opportunity to deliberate. The Second Circuit, for example, acknowledged that officers defending against an excessive-force claim "had ample opportunity to plan the [drug] sting in advance," but the court applied the intent-to-harm standard because defendants were subjected to the "pull of competing obligations"—balancing their safety with that of the plaintiff, "a potentially violent drug dealer"—and "those competing obligations counseled against broad constitutional liability." *Matican v. City of New York*, 524 F.3d 151, 158–59 (2d Cir. 2008).

Similarly, the Third Circuit held that the intent-to-harm standard applies "to the extent the responsibilities of the state actors require a judgment between competing, legitimate interests." *Schieber v. City of Philadelphia*, 320 F.3d 409, 419 (3d Cir. 2003). And the Sixth Circuit held that, when "the government [i]s acting for the benefit of the public,

even a deliberate choice made with knowledge that it would endanger the plaintiffs' health would not shock the conscience." *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 542 (6th Cir. 2008) ("[E]ven where the governmental actor is subjectively aware of a substantial risk of serious harm, we will be unlikely to find deliberate indifference if his action was motivated by a countervailing, legitimate governmental purpose.").

Karsjens therefore does not conflict with previous panel decisions of this Court that applied the deliberate indifference standard. Courts must determine what standard to apply based on the unique circumstances of each case, and none of the prior panel decisions involved conduct in circumstances remotely similar to commitment of sexually violent predators. *Karsjens* thus does not conflict with any prior panel decision. To the contrary, *Karsjens* binds this panel because it is the authoritative interpretation of *Lewis* applied to the context of commitment of sexually violent predators. *See Barber*, 145 F.3d at 237 ("Even if persuaded that [*Karsjens*] is inconsistent with [*Lewis*], we may

not ignore the decision, for in this circuit one panel may not overrule the decision of a prior panel.").

The intent-to-harm standard is also appropriate in this context. Managing a program for the commitment of sexually violent predators involves precisely those competing obligations that "tend to tug against each other." *Lewis*, 523 U.S. at 853. As Plaintiffs' own exhibit establishes, Defendants face "numerous challenges to running an SVP treatment program." Hearing Tr. 19–20 (June 23, 2017). "The community has no tolerance for risk with any re-offense rate seeming too high, and yet programs are attacked for not releasing residents fast enough. Well-meaning treatment providers are often inappropriately targeted by residents who are angry at the system and also inappropriately attacked by other professionals who are politically opposed to the SVP statutes." *Id.*

SVP programs must balance the competing obligations of community safety and proper treatment in a way no other civil commitment system does. The State does not commit all sex offenders—only those 3-to-5 percent who are "at the highest risk to sexually

reoffend." 7 Tr. 182. These individuals frequently have extensive histories of sexual misconduct and recidivism. For example, one person recently committed to SORTS has a three-decade-long rap sheet of over 55 sexual offenses or instances of sexual misconduct, including rape and numerous threats to rape and murder others. *Nelson v. State*, 521 S.W.3d 229, 231 (Mo. 2017). Another person recently committed, when assessed, was determined to be more likely to reoffend than 97 percent of all sex offenders. *Kirk v. State*, 520 S.W.3d 443, 449 (Mo. 2017). Indeed, that person "sodomized his 10- or 11-year-old nephew" less than three months after he was released from prison and before he was committed. *Id.*

Requiring the higher intent-to-harm standard is appropriate in this context. Defendants are given the extremely difficult task of trying to balance the liberty interests of individuals who have proven to be extremely dangerous with the legitimate safety interests of the community. "[T]hose competing obligations counsel[] against broad constitutional liability." *Matican*, 524 F.3d at 158–59.

iii. Even if deliberate indifference were the standard, Plaintiffs could not satisfy that standard.

Although Plaintiffs assume the district court made a finding of deliberate indifference, Pl. Br. 35, the district court did no such thing. It never articulated a *mens rea* standard, nor did it mention the terms "deliberate" or "indifferent," or any variant of those words, in its initial liability opinion. Thus, no court has yet determined whether the record reflects deliberate indifference.

This Court should hold that the record does not. This Court already held that the parallel conduct in *Karsjens* did not establish deliberate indifference because none of the conduct was "egregious." *Karsjens*, 845 F.3d at 411. Moreover, although the intent-to-harm standard is a higher standard than deliberate indifference, Plaintiffs' claim fails under that lesser standard. As the district court expressly found, many of the putative problems with the commitment program are caused in substantial part by funding issues. And as mentioned above, because Plaintiffs bring this class action under Rule 23(b)(2), they must establish that the Defendants possessed the requisite mental

state with respect to *every* class member. They cannot meet that standard.

To establish deliberate indifference, Plaintiffs must prove that the conduct was "patently egregious." *Lewis*, 523 U.S. at 850. That standard requires intentional indifference to a risk of injury so excessive that the knowing failure to ameliorate that risk rises to the level of criminal recklessness. *Letterman v. Does*, 789 F.3d 856, 862 (8th Cir. 2015). This Court already held that none of the purported parallel conduct in the Minnesota commitment program was "egregious," so the conduct necessarily was not "patently egregious." *Karsjens*, 845 F.3d at 410. And the record here does not demonstrate conduct egregious enough to rise to the level of criminal recklessness. It instead reflects the difficulties inherent in administering a commitment program for sexually violent predators.

First, the record states that Defendants' conduct was putatively deficient because the risk assessors sometimes applied an incorrect legal standard when assessing Plaintiffs. Add. B. 3. But the district court found that these legal problems were tied at least in part to

financial issues. It found that "SORTS has historically suffered from staffing and budget shortages." Add. A. 19. And risk assessors were improperly applying the statute because difficulties with training assessors meant "they have misunderstood and been confused about how to apply the statutory criteria." *Id.* at 23. These findings suggest no deliberate indifference, no sadistic intent, but mere mistakes caused by understaffing.

Indeed, the "staffing and budget shortages" are just one piece in the complicated puzzle that makes running an SVP program challenging. Plaintiffs' own exhibit (relied on by the district court) reveals substantial and "numerous challenges to running an SVP treatment program." Hearing Tr. 19–20 (June 23, 2017). Plaintiffs' exhibit states that "[t]he clients are reportedly the highest risk, most disordered and most resistant [sex] offenders . . . . Treatment must be individualized; and yet, all residents must be working toward common phase goals which are clearly defined. The community has no tolerance for risk with any re-offense rate seeming too high, and yet programs are attacked for not releasing residents fast enough. Well-meaning

treatment providers are often inappropriately targeted by residents who are angry at the system and also inappropriately attacked by other professionals who are politically opposed to the SVP statutes. All SVP programs struggle given these circumstances, and Missouri's program is no exception." *Id.*

These various competing pressures suggest that any difficulties in the program's operation are substantially due to the difficult task Defendants must accomplish in balancing the legitimate liberty interests of the class members with the community interest in safety from persons who have been adjudicated to be extremely dangerous.

Second, the district court stated that Defendants putatively failed to implement community reintegration in part because they kept conditionally released individuals in the "Annex" on campus. Although the Annex is "less restrictive" and affords residents the opportunity for "unescorted trips outside the facility," including to "work at jobs in the community, to go grocery shopping, or to simply walk around," *id.* at 8, 29–30, the district court determined that some individuals should have been placed in less restrictive housing, *id.* at 29.

But the district court also acknowledged that Defendants' efforts to create less restrictive housing have been held up by budgetary shortfalls. For several years, Defendants have continuously sought funding "for establishing cottages in the community, in order to implement the community reintegration phase." *Id.* at 31–32. But Defendants were unable to obtain funding to implement those programs. *Id.*

Third, the record states that the Director has not endorsed any individual's petition for release. Add. A. 27. But the Director's endorsement is not needed to petition for or obtain release. Mo. Rev. Stat. §§ 632.501, 632.504. The district court also determined that the lack of Director endorsements was at least partly due to factors over which Defendants lacked control. The process for obtaining an endorsement "stalled indefinitely because one official in the chain—a facility director—was out of the office due to a family emergency" and nobody else had been trained to process applications for endorsement. *Id.* at 28.

Any assertion that these purported problems amount to deliberate indifference is belied by the improvement the program has made in recent years. Assessors evaluate risk based in part on how much progress individuals make in the treatment programs. Initially, "minor infractions could affect a resident's progression." *Id.* at 20. But the district court found that SORTS "now focuses on treatment-related behaviors," not "minor infractions," making the assessors' evaluations more accurate. *Id.* "[M]any aspects of SORTS treatment programs now conform to accepted standards" of other commitment programs. *Id.* at 19. Plaintiffs assert that Defendants demonstrate a pattern and practice of deliberate indifference, but these facts show that administration of the program has improved commensurately with resource increases.

Even if Plaintiffs could establish deliberate indifference for some class members, they cannot establish the same for *every* class member. Yet that is what they must do to obtain relief in a class action brought under Rule 23(b)(2). Again, Plaintiffs can obtain relief only if relief is warranted for "all of the class members," *Jennings*, 138 S. Ct. at 852,

and can be issued with a "single injunction," *Dukes*, 564 U.S. at 360. If a plaintiff cannot establish that Defendants acted in a manner that shocks the conscience with respect to that class member, then the class member "obviously is not entitled to an injunction." *Denton v. Mr. Swiss of Mo., Inc.*, 564 F.2d 236, 242 (8th Cir. 1977). So unless Plaintiffs can establish deliberate indifference for every class member, none can obtain relief.

III. The district court correctly dismissed Plaintiffs' state-law substantive due process claim.

Plaintiffs have asked this Court not to consider this issue at this time. They state that the Court should reach this question "[i]f but only if all five points [Plaintiffs] raised above are rejected as meritless." Pl. Br. 56. But as Plaintiffs acknowledge, one of those points, Point D, is foreclosed by binding circuit precedent and can be considered only en banc. Pl. Br. 52. This Court can also affirm without reaching every one of Plaintiffs' five points by, for example, holding that *Karsjens* controls. Because this Court can rule against Plaintiffs without rejecting every one of their five points, it should follow Plaintiffs' request to disregard this issue.

If this Court does reach this issue, it should reject Plaintiffs' argument. Plaintiffs unsuccessfully moved the district court to dismiss their state-law substantive due process claim without prejudice. The district court rejected that attempt because Plaintiffs failed to exercise any of their many opportunities to argue their state-law claim. Add. D. 1–2. Plaintiffs assert that the district court should not have dismissed that claim with prejudice even though they made no effort to argue that claim, because they contend that they did not affirmatively abandon that claim. Pl. Br. 56–57. That contention has no merit.

Plaintiffs' sole argument is that they cannot "abandon" an issue without taking "affirmative steps to relinquish" it. Pl. Br. 57. But this Court has held that a plaintiff implicitly abandons an issue by failing to argue it. *E.g.*, *Ruminer v. Gen. Motors Corp.*, 483 F.3d 561, 563 n.2 (8th Cir. 2007) ("[I]ssues not raised on appeal are deemed abandoned." (citation omitted)); *Borough v. Duluth, Missabe & Iron Range Ry. Co.*, 762 F.2d 66, 68 n.1 (8th Cir. 1985) (same). Plaintiffs abandoned their state-law substantive due process claim when they failed to prosecute it.

Their failure to prosecute also justifies affirmance under Federal Rule of Civil Procedure 41. Under that rule, "[i]f the plaintiff fails to prosecute," then unless the court specifies otherwise, dismissal "operates as an adjudication on the merits." Fed. R. Civ. P. 41(b). The rule applies not only to motions brought under Rule 41, but also to "any dismissal not under this rule." *Id.* And it applies even if the district court dismisses a claim *sua sponte* because courts have inherent powers to dismiss unprosecuted claims with prejudice. *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962). The district court operated well within its discretion when it chose to dismiss Plaintiffs' unprosecuted claim with prejudice.

Plaintiffs do not deny that they wholly failed to argue their state-law substantive due process claim (except for giving the claim passing reference in a footnote). Pl. Br. 57. They instead contend that they need not have raised the claim on rehearing in the district court because *Karsjens* was the basis for reconsideration and *Karsjens* did not address state-law claims. *Id.* But rehearing to determine whether the district court should reverse its holding is precisely the proper time to argue for

relief under alternative claims. Moreover, that *Karsjens* did not involve state-law claims does not excuse Plaintiffs' repeated failures before *Karsjens* to prosecute their state-law substantive due process claim. The district court did not abuse its discretion when it rejected Plaintiffs' motion to alter or amend.

CONCLUSION

This Court should affirm the judgment of the district court in favor of Defendants.

April 18, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, an electronic copy of the foregoing Response Brief was filed via the Court's electronic filing system and served upon all counsel of record.

/s/ D. John Sauer
First Assistant and Solicitor

CERTIFICATION OF COMPLIANCE

CERTIFICATION OF TYPE VOLUME LIMITATION

I hereby certify that the text of the foregoing document contains 12,287 words of proportionally spaced text as determined by the automated word count of the Microsoft Word 2016 word-processing system and has a 14-point, serif font.

/s/ D. John Sauer
First Assistant and Solicitor